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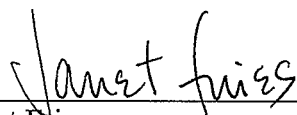
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In the Matter of)
)
DETERMINATION OF REASONABLE RATES) Docket No. 2006-2 CRB NCBRA
AND TERMS FOR NONCOMMERCIAL)
BROADCASTING)
-----X

PROOF OF SERVICE OF THE JOINT MOTION
FOR THE SETTING OF THE PROCEDURAL SCHEDULE

I, Janet Fries, hereby certify that a copy of the Joint Motion for the Setting of the Procedural Schedule was sent by overnight Express Mail to the parties listed below, such that service was effected on February 14, 2006. Service of the Joint Motion for the Setting of the Procedural Schedule was previously made to those identified on the Certificate of Service filed with the Joint Motion for the Setting of the Procedural Schedule on February 10, 2006 with the Copyright Royalty Board.

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Docket No. 2006-2 CRB NCBRA

JOINT MOTION FOR THE SETTING OF THE PROCEDURAL SCHEDULE

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), SESAC, Inc. ("SESAC"), National Public Radio ("NPR"), Public Broadcasting Service ("PBS"), The American Council on Education ("ACE"), the National Music Publishers' Association, Inc. ("NMPA"), The Harry Fox Agency ("Harry Fox") and the National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC") (collectively, the "Parties"), the major participants in past §118 proceedings, hereby file this motion for the setting of the procedural schedule in the above-referenced Section 118 noncommercial broadcasting rate proceeding.

The Section 118 compulsory license has a unique background and history compared to the other statutory licenses set forth in the Copyright Act. As described more fully below, Section 118 was drafted to encourage copyright owners and noncommercial broadcasters to negotiate voluntary settlement agreements. This will avoid the need for costly governmental intervention, which would obviously be a burden on the economic interests of copyright owners that depend on such royalties and the noncommercial entities that participate in these proceedings. The Section 118 license was, and remains, set as a five-year license with the rate adjustments occurring at the end of the five year term. Due to the cyclical nature of the license, the ability of parties to

voluntarily agree on rates and terms has always hinged upon the availability of the most current data relevant to the setting of such rates and terms for the ensuing period (such as economic data, music use data and other information). As a result, Section 118 proceedings in the past have typically not commenced until the middle of the fifth year of the expiring license term, a point in time when more current data was available to the parties.

The Copyright Royalty and Distribution Reform Act of 2004, Public Law No. 108-419, Nov. 30, 2004, 118 Stat. 2341 (the "Reform Act"), however, now requires that notice of the proceeding be issued at the start of the fourth year of the term; a year earlier in the term than has been traditionally the case. This change is significant, again, because the Parties lack sufficient data at this early date in the expiring license term, making projections by the negotiators extremely difficult.

To ameliorate this situation, the Parties respectfully request that the Copyright Royalty Board ("CRB") commence the three-month voluntary negotiation period set out in Section 803(b)(3) and 37 C.F.R. §351.2(a) on June 1, 2006, and propose that the deadline for filing written direct cases be set at January 15, 2007. Given the unique nature of the Section 118 license, this schedule is necessary to afford the Parties the maximum period of time to gather sufficient and adequate data to prepare for and conduct meaningful settlement negotiations, thereby increasing the likelihood of settlement as envisioned by Congress when creating the Section 118 license.

It is clear that the CRB has the statutory and regulatory authority to set the proceeding schedule. See §§801(c) ("The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter"), 802(f)(1)(A) ("the Copyright Royalty Judges shall have full independence in * * * issuing other rulings under this title"). Indeed, the CRB, in exercising such discretion may even suspend or waive any regulatory requirements upon

a showing of good cause so long as the statutory requirements are met. 37 C.F.R. §350.6. The schedule proposed herein comports with historic practice and gives the Parties ample time for negotiation, but still respects the statutory directive for completion of the proceeding by December 31, 2007.

The CRB's authority to set such a schedule is supported by statute, regulation, legislative history and procedural history. The statute and regulations permit CRB discretion in the setting of the proceeding schedule. Moreover, such discretion is supported by the underlying purpose of Section 118 and the amendments to the Copyright Act under the Reform Act to encourage parties to voluntarily negotiate settlements for the setting of rates and terms.

I. The CRB has Statutory and Regulatory Authority to Exercise Discretion in Setting the Schedule.

A. The Reform Act and the Regulations Give the CRB Discretion.

Although Section 118 remained substantively unchanged, the Reform Act modified the procedure for statutory royalty ratemaking and distribution process in a myriad of ways. Beyond abolishing the *ad hoc* nature of decision-making, the Reform Act created a detailed schedule for the completion of statutory royalty proceedings. Rate proceedings, including those under Section 118, are initiated by notice published in the Federal Register. Petitions to participate must be filed thirty days after publication of such notice. See 17 U.S.C. §803(b)(1)(A)(i)(V), 37 C.F.R. §351. Various subsequent procedural milestones in the proceeding then follow a statutorily-mandated schedule: first, the parties must participate in a three-month negotiation period, §803(b)(3); 37 C.F.R. §351.2; second, written direct statements are due not earlier than four months, nor later than five months after the completion of the three-month negotiation period, §803(b)(6)(C)(i); 37 C.F.R. §351.4; third, after the filing of written direct statements and with a

conference of the participants, discovery shall be permitted for sixty days, §803(b)(6)(C)(iv); 37 C.F.R. §351.5; fourth, a post-discovery settlement conference shall be held among the participants within twenty-one days after the close of discovery, §803(b)(6)(C)(x); 37 C.F.R. §351.7; fifth, after an evidentiary hearing and rebuttal cases, the CRB must issue its final determination within eleven months of the post-discovery settlement conference but no less than fifteen days before the expiration of the existing expiring rates and terms, whichever is first. §803(c)(1); 37 C.F.R. §352.2.

As the above statutory and regulatory process sets out, the initial scheduling of the three-month settlement period is crucial in the setting of the proceeding schedule. That settlement period, however, does not include a statutorily or regulatory mandated commencement date. Section 803(b)(3)(A) states merely: "Promptly after the date for filing petitions * * * the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants and shall initiate a voluntary negotiation period among the participants." Unlike the statutorily-mandated deadlines for other procedures (e.g., filing of written direct statements), that must commence at a prescribed time, the statute does not require that the CRB start the three-month negotiation period at any particular time following the issuance of the Federal Register notice initiating the proceeding. Compare §803(b)(6)(C)(i)(mandatory language; "written direct statements . . . shall be filed . . .") [emphasis added]. Had Congress required a specific start date for the three-month negotiation period, it would have clearly so stated.

The regulations state that: "Within thirty-five business days from the date a proceeding is initiated in the Federal Register pursuant to Sec. 351(a), the Copyright Royalty Board will announce the beginning of a voluntary negotiation period ***." 37 C.F.R. §351.2(a). Under this regulation the announcement of the negotiation period must be made with thirty-five days from the CRB's Notice of January 4, 2006, 71 Fed Reg. 1453 (January 9, 2006), but the CRB is not

required to commence the actual negotiation period on that date. It need only "announce" when that period is to commence, such as by issuing a scheduling order. Accordingly, the CRB may commence the three-month period on June 1, 2006.¹

B. The History of Section 118 Favors Providing Ample Settlement Time to the Parties.

Section 118 was predicated upon a specific legislative intent to encourage voluntarily negotiated noncommercial broadcasting licenses. Indeed, since the advent of the Section 118 license in the 1976 Copyright Act, there have been only two litigated proceedings establishing rates payable by PBS and NPR to performing rights organizations: (1) in the very first proceeding in 1978 there was litigation to determine rates and terms payable to ASCAP; and (2) in 1998 a CARP proceeding was held to determine rates for BMI and ASCAP reflecting the industry changes occurring over that twenty year time span. Negotiation and settlement have otherwise been the hallmark of the Section 118 license; except for those two proceedings every party was able to reach a voluntary agreement. Contrast the Section 118 process with other statutory license proceedings, such as the distribution of cable royalties under Section 111 or the Section 114 webcasting compulsory license, that have been fraught with litigation.

This goal of voluntary settlement is built into the Section 118 process. Unlike other statutory licenses enacted in the Copyright Act, the Section 118 compulsory license does not require the CRB to include rates in the provisions of the statute or regulations, or require deposit

¹ Even if §351.2 is interpreted by the CRB as requiring it to initiate the three-month period within thirty-five days, the regulations permit the CRB to waive this requirement upon a showing of good cause:

The regulations of the Copyright Royalty Board are intended to provide efficient and just administrative proceedings and will be construed to advance these purposes. For purposes of an individual proceeding, the provisions of this subchapter may be suspended or waived, in whole or in part, upon a showing of good cause, to the extent allowable by law.

It is clear that the unique nature of the Section 118 license, and its negotiation, presents good cause to necessitate the waiver of thirty-five day requirement of §351.2.

of compulsory royalty fees with the Copyright Office for subsequent distribution to copyright claimants. Cf. 17 U.S.C. §§ 111 (cable compulsory license) and 119 (satellite carrier compulsory license). Rather, Section 118 was enacted with a structure that provided for direct payments between users and copyright owners, focusing on the encouragement of voluntarily negotiated rates and terms between such parties. As stated in the House Report to the 1976 Copyright Revision Act:

In general, the Committee amended the public broadcasting provisions of the Senate bill toward the attainment of the objective clearly stated in the Report of the Senate Judiciary Committee, namely, that copyright owners and public broadcasters be encouraged to reach voluntary private agreements. [emphasis added]. H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, 5733.

Following Congress's clear intention of encouraging voluntary settlements, in the 1976 Act, Section 118 was structured as follows. First, noncommercial broadcasters and copyright owners were encouraged to negotiate and agree upon rates and terms. Copyright owners were permitted to designate common agents to negotiate, agree to, pay and receive payments, notwithstanding any provision of the antitrust laws. Second, for parties that cannot reach a voluntary agreement a proceeding (initially under the CRT and later CARP) to determine reasonable terms and rates of royalty would be held. Third, notwithstanding any proceeding, license agreements voluntarily negotiated at any time between copyright owners and public broadcasters are to be given effect in lieu of any determination by the Librarian of Congress. See §118 (repealed).

The technical amendments in the Reform Act to Section 118 (in a section designated as technical amendments) did not substantively change the emphasis placed therein on encouraging voluntary settlement. Settlement remains the hallmark of Section 118 (and as discussed below, such settlement between the Section 118 participants has been the norm). Moreover, as discussed above, new procedural provisions in the Reform Act that apply to all statutory license proceedings

place an even greater emphasis on encouraging voluntary settlements: i.e., the three-month settlement period and the post-discovery settlement conference.

Accordingly, the structure and the legislative history of Section 118 as well as express language in the Reform Act place a strong emphasis on encouraging voluntary settlement among the parties. Thus, any ambiguity in Section 803 regarding the commencement date for the three-month negotiation period should be viewed with an eye towards encouraging settlement.

The negotiation process for the Section 118 license is unique and requires special accommodation. Critical data the parties use for negotiation, including revenue and music-related data, is not available prior to the expiration of the current license. The current proceeding covers the 2008-2012 term. However, the current data available to the negotiating parties cover periods only through 2004 at best. It would be detrimental to the Parties to require an immediate negotiation schedule based on outdated data; even the inclusion of an extra single year of data — which would likely occur upon the adoption of this motion — would greatly assist the Parties in their negotiations. Indeed, it was partly because of the data availability issues that the last litigated proceeding, concerning the 1998-2002 license period, followed a schedule that ran beyond the expiration of the then current license period (the Librarian's decision was published in September 1998, beyond the expiration of the 1993-1997 license). Sufficient time to collect relevant data would help the avoidance of a costly proceeding is certainly in the interest of the Parties. Moreover, additional time to prepare and file direct cases would provide a more efficient and just proceeding, which underlies the intention of the CRB regulations.

The fact remains that the Section 118 license is unique. The parties to that license have not changed in nearly thirty years and have a history of settlement, as envisioned by Congress when it enacted Section 118. However, a major reason for our ability to reach settlement has been the existence of a schedule that permits fair negotiations using relevant data. Allowing a

useful period of time between filing of the petitions to participate and the start of the three-month period for data gathering and research would facilitate settlement in keeping with the clear dictates and intent of Section 118 and the Reform Act. Accordingly, the Parties respectfully request that the CRB announce a schedule that maximizes the time for data-gathering and negotiation.

C. The Proposed Schedule.

Consistent with the requirement of the Copyright Act and the promulgated regulations, the Parties propose the following procedural schedule:

February 8, 2006	Filing Petitions of Intent to Participate
June 1 – August 31, 2006	Voluntary Negotiation Period of 3 months
January 15, 2007	File Written Direct Statements

Further, as an illustration of how the proceeding could be completed by the statutory deadline of December 31, 2007², the Parties outline below a tentative schedule for consideration, even though we believe it would be premature for the CRB to adopt specific dates for these stages of the proceeding at this time:

January 22 - March 23, 2007	Discovery Period
April 2 - April 23, 2007	Settlement Period (and amendments to WDC)
April 30 - May 25, 2007	Hearings
June 22, 2007	Written Rebuttal Cases
June 22 – July 13, 2007	Discovery Period
July 23 - August 3, 2007	Rebuttal Hearings

² While we believe the CRB may well have discretionary authority to adopt a schedule calling for issuance of its decision after the end of the currently expiring rate period (i.e. issuing a decision after December 16, 2007), we are proposing a conservative schedule below that fits well within the statutory deadline.

August 31, 2007

Proposed Findings and Conclusions

September 21, 2007

Reply Findings and Conclusions

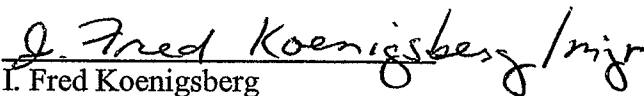
December 16, 2007

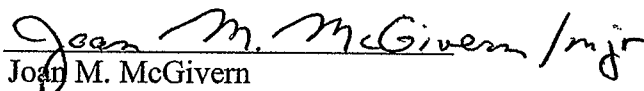
CRB issues decision

As the foregoing schedule demonstrates, commencing the voluntary negotiation period on June 1, 2006, facilitates settlement and allows ample time for the statutory and regulatory deadlines to be met. The Parties respectfully request that this motion be granted.

Respectfully submitted,

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February 10, 2006

CERTIFICATE OF SERVICE

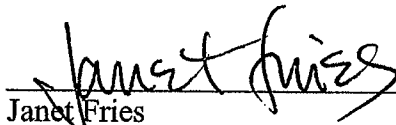
I, Janet Fries, hereby certify that on this 10th day of February, 2006, a copy of the foregoing "Joint Motion for the Setting of the Proceeding Schedule" was served by overnight express mail on the parties listed below.

This service is effectuated without the benefit of a Service List for Docket No. 2006-2 CRB NCBRA, which has not been issued to date. To the best of my knowledge and belief, these are all the parties for whom service is required.

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February 15, 2006

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CRB Program Specialist
Copyright Royalty Board
Library of Congress
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**Re: Proof of Service of the Joint Motion for the Setting of the
Proceeding Schedule**

Dear Ms. Oyewole:

As the enclosed documents demonstrate, the moving parties have now completed service of the Joint Motion for the Setting of the Proceeding Schedule (the "Motion").

When the Motion was filed on Friday, February 10, 2006, the List of Participants had not been made available, nor was it possible for the moving parties to view the Petitions to Participate that were filed. Service was accomplished to the best of our abilities. When the List of Participants was distributed yesterday, we discovered that there were two participants that were not served. This inadvertent omission has now been corrected.

Sincerely,

Janet Fries

Janet Fries

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Enclosures

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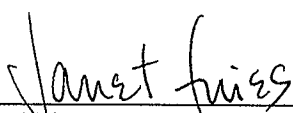
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2/14/06
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GENERAL COUNSEL
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required to commence the actual negotiation period on that date. It need only "announce" when that period is to commence, such as by issuing a scheduling order. Accordingly, the CRB may commence the three-month period on June 1, 2006.¹

B. The History of Section 118 Favors Providing Ample Settlement Time to the Parties.

Section 118 was predicated upon a specific legislative intent to encourage voluntarily negotiated noncommercial broadcasting licenses. Indeed, since the advent of the Section 118 license in the 1976 Copyright Act, there have been only two litigated proceedings establishing rates payable by PBS and NPR to performing rights organizations: (1) in the very first proceeding in 1978 there was litigation to determine rates and terms payable to ASCAP; and (2) in 1998 a CARP proceeding was held to determine rates for BMI and ASCAP reflecting the industry changes occurring over that twenty year time span. Negotiation and settlement have otherwise been the hallmark of the Section 118 license; except for those two proceedings every party was able to reach a voluntary agreement. Contrast the Section 118 process with other statutory license proceedings, such as the distribution of cable royalties under Section 111 or the Section 114 webcasting compulsory license, that have been fraught with litigation.

This goal of voluntary settlement is built into the Section 118 process. Unlike other statutory licenses enacted in the Copyright Act, the Section 118 compulsory license does not require the CRB to include rates in the provisions of the statute or regulations, or require deposit

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It is clear that the unique nature of the Section 118 license, and its negotiation, presents good cause to necessitate the waiver of thirty-five day requirement of §351.2.

of compulsory royalty fees with the Copyright Office for subsequent distribution to copyright claimants. Cf. 17 U.S.C. §§ 111 (cable compulsory license) and 119 (satellite carrier compulsory license). Rather, Section 118 was enacted with a structure that provided for direct payments between users and copyright owners, focusing on the encouragement of voluntarily negotiated rates and terms between such parties. As stated in the House Report to the 1976 Copyright Revision Act:

In general, the Committee amended the public broadcasting provisions of the Senate bill toward the attainment of the objective clearly stated in the Report of the Senate Judiciary Committee, namely, that copyright owners and public broadcasters be encouraged to reach voluntary private agreements. [emphasis added]. H.R. Rep. 94-1476, 1976 U.S.C.C.A.N. 5659, 5733.

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The technical amendments in the Reform Act to Section 118 (in a section designated as technical amendments) did not substantively change the emphasis placed therein on encouraging voluntary settlement. Settlement remains the hallmark of Section 118 (and as discussed below, such settlement between the Section 118 participants has been the norm). Moreover, as discussed above, new procedural provisions in the Reform Act that apply to all statutory license proceedings

place an even greater emphasis on encouraging voluntary settlements: i.e., the three-month settlement period and the post-discovery settlement conference.

Accordingly, the structure and the legislative history of Section 118 as well as express language in the Reform Act place a strong emphasis on encouraging voluntary settlement among the parties. Thus, any ambiguity in Section 803 regarding the commencement date for the three-month negotiation period should be viewed with an eye towards encouraging settlement.

The negotiation process for the Section 118 license is unique and requires special accommodation. Critical data the parties use for negotiation, including revenue and music-related data, is not available prior to the expiration of the current license. The current proceeding covers the 2008-2012 term. However, the current data available to the negotiating parties cover periods only through 2004 at best. It would be detrimental to the Parties to require an immediate negotiation schedule based on outdated data; even the inclusion of an extra single year of data – which would likely occur upon the adoption of this motion - would greatly assist the Parties in their negotiations. Indeed, it was partly because of the data availability issues that the last litigated proceeding, concerning the 1998-2002 license period, followed a schedule that ran beyond the expiration of the then current license period (the Librarian's decision was published in September 1998, beyond the expiration of the 1993-1997 license). Sufficient time to collect relevant data would help the avoidance of a costly proceeding is certainly in the interest of the Parties. Moreover, additional time to prepare and file direct cases would provide a more efficient and just proceeding, which underlies the intention of the CRB regulations.

The fact remains that the Section 118 license is unique. The parties to that license have not changed in nearly thirty years and have a history of settlement, as envisioned by Congress when it enacted Section 118. However, a major reason for our ability to reach settlement has been the existence of a schedule that permits fair negotiations using relevant data. Allowing a

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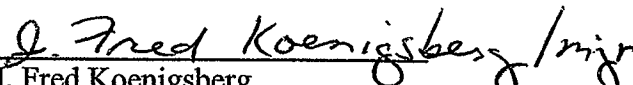
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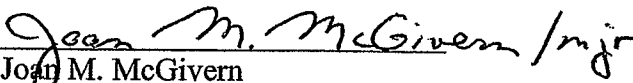
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As the foregoing schedule demonstrates, commencing the voluntary negotiation period on June 1, 2006, facilitates settlement and allows ample time for the statutory and regulatory deadlines to be met. The Parties respectfully request that this motion be granted.

Respectfully submitted,

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February 10, 2006

CERTIFICATE OF SERVICE

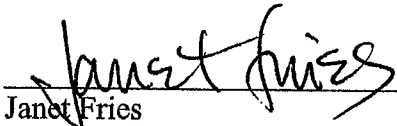
I, Janet Fries, hereby certify that on this 10th day of February, 2006, a copy of the foregoing "Joint Motion for the Setting of the Proceeding Schedule" was served by overnight express mail on the parties listed below.

This service is effectuated without the benefit of a Service List for Docket No. 2006-2 CRB NCBRA, which has not been issued to date. To the best of my knowledge and belief, these are all the parties for whom service is required.

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Carol Pierson
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National Federation of Community Broadcasters
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P.O. Box 3642
Oakland, CA 94618
*Counsel for National Federation of
Community Broadcasters*



Janet Fries

Before the
COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, DC

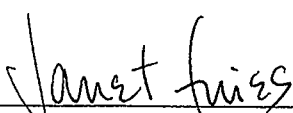
-----X
In the Matter of)
)
DETERMINATION OF REASONABLE RATES) Docket No. 2006-2 CRB NCBRA
AND TERMS FOR NONCOMMERCIAL)
BROADCASTING)
-----X

**PROOF OF SERVICE OF THE JOINT MOTION
FOR THE SETTING OF THE PROCEDURAL SCHEDULE**

I, Janet Fries, hereby certify that a copy of the Joint Motion for the Setting of the Procedural Schedule was sent by overnight Express Mail to the parties listed below, such that service was effected on February 14, 2006. Service of the Joint Motion for the Setting of the Procedural Schedule was previously made to those identified on the Certificate of Service filed with the Joint Motion for the Setting of the Procedural Schedule on February 10, 2006 with the Copyright Royalty Board.

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Law Firm of Rush Hicks
49 Music Square West
Suite 503
Nashville, TN 37203
Counsel for Church Music Publishers' Assoc. Inc.

Royalty Logic, Inc.
c/o Les Watkins
405 Riverside Drive
Burbank, CA 91506



Janet Fries

 COPY

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GENERAL COUNCIL
OF COPYRIGHT

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Library of Congress
Washington, DC

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-----X
In the Matter of)

)
DETERMINATION OF REASONABLE RATES)
AND TERMS FOR NONCOMMERCIAL)
BROADCASTING)
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Docket No. 2006-2 CRB NCBRA

JOINT MOTION FOR THE SETTING OF THE PROCEDURAL SCHEDULE

The American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), SESAC, Inc. ("SESAC"), National Public Radio ("NPR"), Public Broadcasting Service ("PBS"), The American Council on Education ("ACE"), the National Music Publishers' Association, Inc. ("NMPA"), The Harry Fox Agency ("Harry Fox") and the National Religious Broadcasters Noncommercial Music License Committee ("NRBNMLC") (collectively, the "Parties"), the major participants in past §118 proceedings, hereby file this motion for the setting of the procedural schedule in the above-referenced Section 118 noncommercial broadcasting rate proceeding.

The Section 118 compulsory license has a unique background and history compared to the other statutory licenses set forth in the Copyright Act. As described more fully below, Section 118 was drafted to encourage copyright owners and noncommercial broadcasters to negotiate voluntary settlement agreements. This will avoid the need for costly governmental intervention, which would obviously be a burden on the economic interests of copyright owners that depend on such royalties and the noncommercial entities that participate in these proceedings. The Section 118 license was, and remains, set as a five-year license with the rate adjustments occurring at the end of the five year term. Due to the cyclical nature of the license, the ability of parties to

voluntarily agree on rates and terms has always hinged upon the availability of the most current data relevant to the setting of such rates and terms for the ensuing period (such as economic data, music use data and other information). As a result, Section 118 proceedings in the past have typically not commenced until the middle of the fifth year of the expiring license term, a point in time when more current data was available to the parties.

The Copyright Royalty and Distribution Reform Act of 2004, Public Law No. 108-419, Nov. 30, 2004, 118 Stat. 2341 (the "Reform Act"), however, now requires that notice of the proceeding be issued at the start of the fourth year of the term; a year earlier in the term than has been traditionally the case. This change is significant, again, because the Parties lack sufficient data at this early date in the expiring license term, making projections by the negotiators extremely difficult.

To ameliorate this situation, the Parties respectfully request that the Copyright Royalty Board ("CRB") commence the three-month voluntary negotiation period set out in Section 803(b)(3) and 37 C.F.R. §351.2(a) on June 1, 2006, and propose that the deadline for filing written direct cases be set at January 15, 2007. Given the unique nature of the Section 118 license, this schedule is necessary to afford the Parties the maximum period of time to gather sufficient and adequate data to prepare for and conduct meaningful settlement negotiations, thereby increasing the likelihood of settlement as envisioned by Congress when creating the Section 118 license.

It is clear that the CRB has the statutory and regulatory authority to set the proceeding schedule. See §§801(c) ("The Copyright Royalty Judges may make any necessary procedural or evidentiary rulings in any proceeding under this chapter"), 802(f)(1)(A) ("the Copyright Royalty Judges shall have full independence in * * * issuing other rulings under this title"). Indeed, the CRB, in exercising such discretion may even suspend or waive any regulatory requirements upon

a showing of good cause so long as the statutory requirements are met. 37 C.F.R. §350.6. The schedule proposed herein comports with historic practice and gives the Parties ample time for negotiation, but still respects the statutory directive for completion of the proceeding by December 31, 2007.

The CRB's authority to set such a schedule is supported by statute, regulation, legislative history and procedural history. The statute and regulations permit CRB discretion in the setting of the proceeding schedule. Moreover, such discretion is supported by the underlying purpose of Section 118 and the amendments to the Copyright Act under the Reform Act to encourage parties to voluntarily negotiate settlements for the setting of rates and terms.

I. The CRB has Statutory and Regulatory Authority to Exercise Discretion in Setting the Schedule.

A. The Reform Act and the Regulations Give the CRB Discretion.

Although Section 118 remained substantively unchanged, the Reform Act modified the procedure for statutory royalty ratemaking and distribution process in a myriad of ways. Beyond abolishing the *ad hoc* nature of decision-making, the Reform Act created a detailed schedule for the completion of statutory royalty proceedings. Rate proceedings, including those under Section 118, are initiated by notice published in the Federal Register. Petitions to participate must be filed thirty days after publication of such notice. See 17 U.S.C. §803(b)(1)(A)(i)(V), 37 C.F.R. §351. Various subsequent procedural milestones in the proceeding then follow a statutorily-mandated schedule: first, the parties must participate in a three-month negotiation period, §803(b)(3); 37 C.F.R. §351.2; second, written direct statements are due not earlier than four months, nor later than five months after the completion of the three-month negotiation period, §803(b)(6)(C)(i); 37 C.F.R. §351.4; third, after the filing of written direct statements and with a

conference of the participants, discovery shall be permitted for sixty days, §803(b)(6)(C)(iv); 37 C.F.R. §351.5; fourth, a post-discovery settlement conference shall be held among the participants within twenty-one days after the close of discovery, §803(b)(6)(C)(x); 37 C.F.R. §351.7; fifth, after an evidentiary hearing and rebuttal cases, the CRB must issue its final determination within eleven months of the post-discovery settlement conference but no less than fifteen days before the expiration of the existing expiring rates and terms, whichever is first. §803(c)(1); 37 C.F.R. §352.2.

As the above statutory and regulatory process sets out, the initial scheduling of the three-month settlement period is crucial in the setting of the proceeding schedule. That settlement period, however, does not include a statutorily or regulatory mandated commencement date. Section 803(b)(3)(A) states merely: "Promptly after the date for filing petitions * * * the Copyright Royalty Judges shall make available to all participants in the proceeding a list of such participants and shall initiate a voluntary negotiation period among the participants." Unlike the statutorily-mandated deadlines for other procedures (e.g., filing of written direct statements), that must commence at a prescribed time, the statute does not require that the CRB start the three-month negotiation period at any particular time following the issuance of the Federal Register notice initiating the proceeding. Compare §803(b)(6)(C)(i)(mandatory language; "written direct statements . . . shall be filed . . .") [emphasis added]. Had Congress required a specific start date for the three-month negotiation period, it would have clearly so stated.

The regulations state that: "Within thirty-five business days from the date a proceeding is initiated in the Federal Register pursuant to Sec. 351(a), the Copyright Royalty Board will announce the beginning of a voluntary negotiation period ***." 37 C.F.R. §351.2(a). Under this regulation the announcement of the negotiation period must be made with thirty-five days from the CRB's Notice of January 4, 2006, 71 Fed Reg. 1453 (January 9, 2006), but the CRB is not

required to commence the actual negotiation period on that date. It need only "announce" when that period is to commence, such as by issuing a scheduling order. Accordingly, the CRB may commence the three-month period on June 1, 2006.¹

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Section 118 was predicated upon a specific legislative intent to encourage voluntarily negotiated noncommercial broadcasting licenses. Indeed, since the advent of the Section 118 license in the 1976 Copyright Act, there have been only two litigated proceedings establishing rates payable by PBS and NPR to performing rights organizations: (1) in the very first proceeding in 1978 there was litigation to determine rates and terms payable to ASCAP; and (2) in 1998 a CARP proceeding was held to determine rates for BMI and ASCAP reflecting the industry changes occurring over that twenty year time span. Negotiation and settlement have otherwise been the hallmark of the Section 118 license; except for those two proceedings every party was able to reach a voluntary agreement. Contrast the Section 118 process with other statutory license proceedings, such as the distribution of cable royalties under Section 111 or the Section 114 webcasting compulsory license, that have been fraught with litigation.

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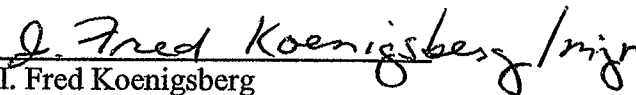
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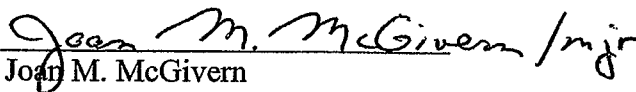
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Respectfully submitted,

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February 10, 2006

CERTIFICATE OF SERVICE

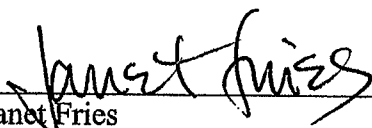
I, Janet Fries, hereby certify that on this 10th day of February, 2006, a copy of the foregoing "Joint Motion for the Setting of the Proceeding Schedule" was served by overnight express mail on the parties listed below.

This service is effectuated without the benefit of a Service List for Docket No. 2006-2 CRB NCBRA, which has not been issued to date. To the best of my knowledge and belief, these are all the parties for whom service is required.

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